UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:	)	
	)	
DONALD ANTHONY MCCOY,	)	CASE NO. 04-60395 JPK
	)	Chapter 13
Debtor.	)	

ORDER DETERMINING VALUE OF ALLOWED SECURED CLAIM

This contested matter arises from the objection to confirmation of the debtor's Chapter 13 plan filed by LaSalle National Bank ("LaSalle") on May 13, 2004, with respect to the plan filed on February 13, 2004 by the debtor Donald Anthony McCoy ("McCoy").

McCoy's plan provides for a value of $13,300.00 with respect to LaSalle's allowed secured claim. It is this value which LaSalle has challenged in its objection to confirmation of McCoy's plan.

On March 11, 2005, an evidentiary hearing was held to determine the value of LaSalle's allowed secured claim. McCoy appeared at that hearing by counsel Andrew J. Kopko; LaSalle appeared by counsel Adam D. Decker; the Chapter 13 Trustee appeared by counsel Julia M. Hoham.

While generally the rights of the holder of a claim secured only by a security interest in real property that is the debtor's principal residence cannot be modified [11 U.S.C. § 1322(b)(2)] the parties agree that because McCoy's indebtedness to LaSalle matured prior to the filing of his Chapter 13 case, the provisions of 11 U.S.C. § 1322(c)(2) are applicable to the valuation of LaSalle's allowed secured claim. That provision states:

> (c) Notwithstanding subsection (b)(2) and applicable nonbankruptcy law –
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> . . .
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> (2) in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to

> section 1325(a)(5) of this title.

The phrase "payment of the claim as modified pursuant to section 1325(a)(5)" refers to that section's requirement that in order to be confirmed, a Chapter 13 plan must comply with the provisions of that section with respect to the allowed secured claim of the affected creditor. Because LaSalle has not accepted McCoy's plan, and because that plan does not provide for surrender of McCoy's residence to LaSalle, the provisions of 11 U.S.C. § 1325(a)(5)(B) must be satisfied. Thus, in this case, the Court can confirm McCoy's Chapter 13 plan only if, with respect to LaSalle's allowed secured claim, the following criteria are satisfied:

> **(B)(i)** the plan provides that the holder of such claim retain the lien securing such claim; and
> **(ii)** the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim.

The provisions of 11 U.S.C. § 506(a) must be applied to determine the value of LaSalle's allowed secured claim; this statute states the following:

> (a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

The critical valuation principle, as stated in the foregoing provision, is that the relevant value is to "be determined in light of the purpose of the valuation and of the proposed disposition or use of such property". Because under his plan, McCoy proposes to retain the property, the applicable valuation standard is "fair market value", i.e., "the price which a willing seller under no compulsion to sell and a willing buyer under no compulsion to buy would agree

upon after the property has been exposed to the market for a reasonable time", *In re Taffi*, 96 F.3d 1190, 1191 (9th Cir. 1996); *In re Arpaia III*, 143 B.R. 587 (Bankr. D.Conn. 1992).

In determining fair market value, the "comparable sales" approach is generally the preferred mechanism for valuing properties of the nature of McCoy's, just as it is in eminent domain proceedings in federal courts. As stated in *El Paso Natural Gas Company v. Federal Energy Regulatory Commission*, 96 F.3d 1460, 1464 (D.C. Cir. 1996):

> We agree with El Paso that evidence of contemporaneous sales of comparable properties is generally the preferred method of valuation. *See United States v. 320.0 Acres of Land*, 605 F.2d 762, 798 (5th Cir.1979) ("Courts have consistently recognized that, in general, comparable sales constitute the best evidence of market value."). The validity of this method, however, depends on both the timing of the sales and the "comparability" of the properties involved. Where the properties are not shown to be sufficiently similar or the sales sufficiently contemporaneous, the "trier of fact . . . must resort to other means of determining fair market value." 103.38 Acres of Land, 660 F.2d at 211.
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> . . .
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> The similarities, of course, must be sufficiently relevant to enable the trier of fact to determine, with reasonable confidence, the price that a buyer would be willing to pay a willing seller for the property being valued, both being informed of the relevant facts and neither being under any compulsion to buy or sell. *See Reservation Eleven Assocs. v. District of Columbia*, 420 F.2d 153, 155 (D.C.Cir.1969).

The concept of "comparability" was well defined in *United States v. 819.98 Acres of Land, etc.*, 78 F.3d 1468, 1471 (10th Cir. 1996) as follows:

> In this circuit, "[t]he best evidence of market value of real property in condemnation is, of course, found in sales of comparable land within a reasonable time before the taking." *United States v. 179.26 Acres of Land*, 644 F.2d 367, 371 (10th Cir.1981); *accord United States v. 10,031.98 Acres of Land*, 850 F.2d 634, 641 (10th Cir.1988); *United States v. 2,560.00 Acres of Land*, 836 F.2d 498, 502 n. 2 (10th Cir.1988); *United States v. 25.02 Acres of Land*, 495 F.2d 1398, 1400 (10th Cir.1974). Comparability is a question of fact, and the district court may exercise broad discretion in determining the admissibility of evidence of comparable sales. *United States v. 45,131.44 Acres of Land*, 483 F.2d 569, 571 (10th Cir.1973). Although comparable sales offer the "best evidence of market value," we have observed "that the law is not wedded to

> any particular formula or method for determining fair market value as the measure of just compensation." *Sill Corp. v. United States*, 343 F.2d 411, 416 (10th Cir.), *cert. denied*, 382 U.S. 840, 86 S.Ct. 88, 15 L.Ed.2d 81 (1965).

As stated in *United States v. 534.28 Acres of Land, etc.*, 442 F. Supp. 82, 84-85 (M.D.Pa. 1977):

> Sales of comparable land in the area provide valuable assistance in determining fair market value. *See United States v. Featherston*, 325 F.2d 539 (10th Cir. 1963). A comparable sale must be one that sufficiently resembles the parcel in question with respect to time, place and circumstances that reasonable men would consider it in evaluating fair market value. Nichols on Eminent Domain, s 13.02(4) "Selection and Presentation of Comparable Sales."

With the foregoing principles in mind, we now turn to the evidence adduced at the hearing held on March 11, 2005. Each party presented the testimony of a single witness in support of its/his assertions as to the proper value to be placed upon McCoy's residence.

LaSalle's witness was Samuel James Osika. Mr. Osika's occupation is that of a residential appraiser, a field in which he has been engaged for 8-10 years. He presently works for two firms which are in the appraisal business. Mr. Osika is a licensed appraiser in the State of Indiana, holding a residential appraisal license which he has held for 8-10 years. Mr. Osika estimates that over the 8-10 year period during which he has been a licensed residential appraiser, he has performed between 300 and 400 appraisals a year. The Court finds that Mr. Osika is qualified as an expert witness under Rule 702 of the Federal Rules of Evidence to give an opinion as an expert on the issue of valuation of McCoy's residence, pursuant to the provisions of Rules 702, 703 and 704 of the Federal Rules of Evidence.

Mr. Osika's opinion is expressed in Exhibit "A" which was admitted into evidence at the hearing. In performing his appraisal, Mr. Osika inspected both the interior and exterior of the subject property in early January 2005. He testified that the house is in a neighborhood that was predominantly built in the 1920s and 1930s, but that McCoy's house is newer, being only

48 years old. Because the discrepancy in the age of the neighborhood and the age of the subject property, Mr. Osika placed a premium on finding houses of comparable age in relative proximity to the subject, and thus the age of a property was the primary factor used by Mr. Osika to identify comparable sales. His report and testimony identified three properties which were deemed by him to be comparable:

1. 3635 Fillmore Street, a 49-year-old all-brick ranch comprised of four rooms, two bedrooms, one bath, having a square footage of 860 square feet, a full basement of identical square footage, and a 2-car detached garage.

2. 4827 Pennsylvania, a 41-year-old all-brick ranch of 1,086 square feet, having five rooms, including three bedrooms, a full unfinished basement; and 2-car detached garage.

3. 4846 Pennsylvania, a 42-year-old all-brick ranch comprised of five rooms, including three bedrooms, one and one-half baths, with a square footage of 1,107 square feet; a full basement of identical square footage with a bathroom in the basement; and a 2-car detached garage.

Mr. Osika testified that the appraisal request he received "required three active listings in the subject area", each of which he identified in an addendum to his appraisal report and during his trial testimony. In Mr. Osika's opinion, $11,500.00 worth of repairs would be required to place the property in relatively good shape.

Utilizing the comparable sales approach – which he identified as the best mechanism for valuing the subject property – Mr. Osika stated that in his opinion the property had a value of $25,000.00 "as is".

On cross-examination, McCoy's counsel focused on the relative comparability of the neighborhoods in which the comparable sales utilized by Mr. Osika were located, in contrast to the neighborhood in which McCoy's residence is located. Mr. Osika again reiterated that the principle criteria for identification of a comparable was the age of the house, not necessarily the

neighborhood in which it was located. He acknowledge that the comparable at 3635 Fillmore Street could be in a "fairly desirable area" when compared to the location of the subject at 4140 Jefferson. He stated that in his opinion, the comparable he used at 4800 Pennsylvania was in a neighborhood similar to that in which the subject is located.

Testimony on behalf of the debtor was provided by Jack Gross. Mr. Gross is a real estate investor, involved in a personal business in which he buys and sells properties for his own account. This business is conducted primarily in Gary, and over the course of the past 30 years, he estimated that he had purchased/sold over 200 properties. The principle focus of his purchases is distressed property, which he defined as property being sold at foreclosure sales, by banks or by other involuntary or similarly compulsive circumstances. Mr. Gross inspected the subject property early in March.

Mr. Gross is not a licensed appraiser, and he has never worked in the real estate field as a licensed broker. However, based upon his experience, the Court finds that Jack Gross was qualified as an expert under the provisions of Rule 702 of the Federal Rules of Evidence, in order to express an opinion as an expert within the parameters of Rules 702, 703 and 704 of the Federal Rules of Evidence.

Mr. Gross estimated that the repair costs to bring the property up to snuff would be approximately $20,000.00, an estimate which he based on his experience in doing rehabilitation work on houses. Mr. Gross identified the neighborhood in which the subject is located as "basically a drug-infested area", one which had little sales activity because of its undesirability. He stated that in his opinion the comparable utilized by Mr. Osika at 3637 Fillmore Street was in a more desirable location than is the subject, as were in his opinion, the other comparables utilized by Mr. Osika. Implicit in Mr. Gross' testimony is his opinion that the comparability of the sales utilized by Mr. Osika to derive his opinion of value were diminished by the nature of the neighborhoods in which the comparables are located, as contrasted to the neighborhood in

which McCoy's residence is located.

Mr. Gross expressed an opinion that the Lake County Assessor's assessed valuation of the property – $13,500.00 – was "probably closer to the market value of what a willing buyer would pay for the property for cash in hand". He stated that he himself would only pay approximately $10,000.00 for the property. Finally, he stated that in his opinion, the top price for the McCoy property, fully repaired, would be $35,000.00; that his estimate of cost of repairs was $20,000.00; and that, implicitly, therefore his opinion as to the value of the subject property was $15,000.00. Taken as a whole, the Court deems Mr. Gross to have stated an opinion of $15,000.00 as to the value of the property.

Thus, we come down to the proverbial "battle of the experts". LaSalle's expert's opinion is $25,000.00; McCoy's expert's opinion is $15,000.00.

Both witnesses have strong points and weak points.

Mr. Osika's opinion is based much more on a market analysis than is Mr. Gross'. Mr. Osika attempted to identify properties which he deemed to be "comparable" for the purposes of deriving his opinion; Mr. Gross did not consult any comparable sales data. Thus, Mr. Osika's opinion has certain empirical support which Mr. Gross' lacks.

However, the issue of "comparability" of sales is an important one in this case. Mr. Gross stated that the comparables utilized by his counterpart were not in fact "comparable" due to the differences in the neighborhoods in which those properties are located as contrasted to that in which the subject is located. Mr. Osika has had no experience in any of the neighborhoods in which the properties are located, while Mr. Gross has. Based upon its experience, this Court is a little skeptical of placing such critical importance on the age of a dwelling, as contrasted to its location, in determining comparability.

Mr. Gross' opinion, on the other hand, is premised upon significant purchase and sale experience in properties of the type at issue here. However, most of that experience has been

derived in distressed circumstances, and although he was certainly a "willing buyer" in the transactions in which he has engaged over the years, most of those transactions appear to have been involved with a somewhat less than willing seller under some compulsion to sell. In the Court's view, Mr. Gross' opinion of value is based more on his referential framework as a real estate investor, and thus his opinion of value reflects more an estimate of what a property may be worth in the rehab resale market, rather than based upon truly non-compulsive transactions.

The Court finds that neither expert's opinion is entirely persuasive. The record establishes a lack of comparability of the sales utilized by Mr. Osika in deriving his opinion, and thus his opinion must be adjusted downward. The record does not establish an extremely concrete basis of a value based upon a purchase "between a willing seller and a willing buyer, under no compulsion to buy or sell" for Mr. Gross' opinion of value, and thus his opinion must be adjusted upward. In sum, the Court deems each of the two competing appraisals to be equally foundationally flawed. As a result, in the classic manner in which most valuation disputes are determined at trial, the Court deems the mid-point between the two ascribed values to be the fair market value of the property.

IT IS ORDERED, ADJUDGED AND DECREED that the value of LaSalle's allowed secured claim under 11 U.S.C. § 506(a), to be utilized in this case with respect to review of the debtor's plan under 11 U.S.C. § 1325(a)(5), is $20,000.00.

Dated at Hammond, Indiana on May 12, 2005.

/s/ J. Philip Klingeberger
J. Philip Klingeberger
United States Bankruptcy Court

Distribution:
Debtor, Attorney for Debtor
Trustee, US Trustee